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ARGUMENT.

I.

THE COURT OF APPEALS HAS AFFIRMED DUMMONT LABORATORIES, INC. V. CARROLL.

The United States Court of Appeals for the Third Circuit on September 5, 1950 affirmed the judgment of the District Court in the case of Allen B. Dummont Laboratories, Inc. v. Carroll, et al. (86 F. Supp. 813), which was referred to in the Petition. The affirmance brings into sharp relief the conflict between the state court and the federal courts upon the important questions of federal law presented in the Petition for Writ of Certiorari.

The opinion by Chief Judge Biggs has not yet been reported and is printed herein as Appendix "A". It affirms the propositions that "television broadcasting is in interstate commerce"; that "the Communications Act of 1934 applies to every phase of television"; "that Congress has occupied the field of television regulation and that the field is no longer open to the States." Respondents' contentions upon these issues (Respondents' Brief, pp. 4-9) are therefore without merit.

Respondents' contention that the regulation of television reception is not encompassed by the Communications Act (Respondents' Brief, p. 9) by-passes the realities of electrical communications, for the reception apparatus, is an integral and essential instrument of such communications. The phenomenon of television communications is rendered non-existent by the absence of the reception apparatus (R. 19, 20, 21). Respondents' contention ignores the Congressional definition which expressly includes such ap-

paratus as a part of radio communications (47 U. S. C. #153 (b); Petition, p. 13).

II.

ZIFFRIN V. REEVES IS NOT APPLICABLE.

Ziffrin, Inc. v. Reeves, 308 U. S. 132, cited by the respondents (pp. 9 and 15), is not applicable either in principle or to the facts of this matter. The subject matter of state regulation in that case was intoxicants and the transportation thereof. With respect to this subject matter, the power of the states is derived from the Twenty-first Amendment of the Constitution of the United States, and the Constitutional policy is local and not national regulation. The subject matter of regulation in the case at bar is not intoxicants, but television, a form of radio communications which is subject to regulation solely under the Commerce Clause of the Constitution, and with respect to which Congressional regulation is absolutely exclusive. The states cannot exercise any police power with respect to this subject. The supposition that the licensing of television will aid in the control of liquor dispensation in Pennsylvania, cannot create any power in the State, when Congress in the clearest manner has manifest its purpose to exercise its exclusive power over television communications. As is indicated in the Petition, the supposed relationship between television exhibitions and sales of intoxicants is a matter of pure conjecture (Petition, p. 20). The Supreme Court of Pennsylvania has moreover twice stated that the intent of subsection 14, Section 602 of the Pennsylvania Liquor Control Board is the "regulation * * * in licensed establishments of pictures * * * produced by television" (R. 56, Petition p. 14). This can mean only that the

Supreme Court of Pennsylvania construes the law to mean that the Respondents may regulate television programs in licensed establishments. This encroaches directly upon the exclusive domain of the Communications Commission for "The Communications Act of 1934 applies to every phase of television" and "program control was entrusted to the federal commission. * * *" (Biggs, Ch. J., in Allen B. Dumont Laboratories, Inc. et al below, Appendix, pages 5 to 10, inc.)

The Respondents, for the purpose of utilizing Ziffrin, Inc. v. Reeves, supra, as authority for the position that the amusement permit fee is not confiscatory, make the argument inferentially, that the purpose of the amusement fee is to raise revenue (Respondents' Brief, p. 16). The Pennsylvania courts in this litigation have made clear that the licensing here was not "an exercise of the taxing power of the State to raise revenue." (Opinion, R. 58.)

It should be noted that the fees for liquor licenses are not retained by the Respondent Board for purposes of state revenue, but, pursuant to statutory direction, are paid over by the Board "to the respective municipalities and townships in which the respective licensed places are situated" (1933, Sp. Sess.; Nov. 29, P. L. 15, Art. VII, #701, 1935, July 18, P. L. 1246 #1, 1937, June 16, P. L. 1762, # ; 47 Purdons Digest 744-701). This is intended to cover the cost of local police control. The amusement permit fee which is the subject of this litigation is by the express terms of subsection 14 of Section 602 "paid into the State Store Fund", into which various filing fees, wholesaler's license fees, penalties and the profits of the State Store System are paid, and from which the expenditures of the Board incurred for licensing and enforcement referred to in the Bill in Equity are paid. (1933 Sp. Sess., Nov. 29, P. L. 15, Art. VII, #702, 1935, July 18, P. L. 1246 #1; 1937, June 16, P. L. 1762 #1; 47 Purdons Digest 744-702.)

The Respondents do not deny the facts of confiscation, nor do they deny the applicability of the decisions in Postal Telegraph Cable Co. v. Taylor, 192 U. S. 64; in Great Northern Railway Co. v. Washington, 300 U. S. 154, referred to in the Petition (p. 16).

III.

CONCLUSION.

It is respectfully submitted that the reasons given in the Petition for the granting of the Writ of Certiorari have in no manner been impaired by Respondents' contentions. The Petition presents not only a direct conflict of authority in a new, but increasingly important field of federal regulation, but a grave violation of constitutional protection affecting numerous persons, contrary to the decisions of this Court.

Respectfully submitted,

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APPENDIX A.

OPINION.

ALLEN B. DUMMONT LABORATORIES, INC., ET AL.,
vs.
CARROLL, ET AL.

(No. 10136 in the United States Court of Appeals for the Third Circuit.)

OPINION BY CHIEF JUDGE BIGGS, SEPTEMBER 5, 1950.

(Reported, Philadelphia Legal Intelligencer, September 7, 1950.)

The suit at bar was brought under the Federal Declaratory Judgments Act, now 28 U. S. C. §§2201-02, to determine whether the Commonwealth of Pennsylvania, pursuant to a regulation promulgated by the State Board of Censors under the Act of May 15, 1915, P. L. 534, as amended, 4 PS §§41-58, may censor films used by the plaintiffs in projecting television programs in the State of Pennsylvania. The court below found among other things, 86 F. Supp. 813, that the regulation promulgated by the Board of Censors conflicted with Federal authority in a field fully occupied by Congress when it enacted the Radio Act of 1927, 44 Stat. at L. 1162, and the Communications Act of 1934, 47 U. S. C. Supp. §§151 et seq., and found the regu-

lation invalid. The members of the Board of Censors have appealed.

The television programs broadcast by the plaintiffs are received by persons possessing television sets not only within the borders of the Commonwealth of Pennsylvania but also, depending upon the location and power of the broadcasting station, in Delaware, Maryland, New Jersey, West Virginia, Ohio and New York. As was found by the court below, "There is no way by which the television broadcasts of the plaintiffs can possibly be confined so as to be received exclusively by receiving sets within Pennsylvania". The record also demonstrates that some of the plaintiffs' programs are delivered by wire or radio relay from television stations located outside of Pennsylvania. There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature.

We think it unnecessary to describe in any great detail the technical methods whereby films are made or procured and employed by the television industry. "Live" programs consist of the broadcast of pictures of living persons actually before the camera at the time of transmission. But film may be integrated into an otherwise live program to furnish sound, action or background. By the process known as "kinescope recording" or "tele-transcription" live programs may be and frequently are recorded on film at the time of their production to the end that the film can be used for broadcasts of the programs. By "bicycling" the same print may be used successively at different broadcasting stations distant from each other. Of the films used for television broadcasting by the plaintiff stations only a small part are made or originate within Pennsylvania. The record also demonstrates that of all the broadcasting conducted by the television stations of the United States at least 25 percent consists of the projecting of films. The

percentage of films used in the industry is growing constantly.

We agree with the court below that the Communications Act of 1934 covers the television, as well as the radio field. 47 U. S. C. §152(a), provides: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States in such communication or such transmission of energy by radio and to the licensing and regulating of all radio stations as hereinafter provided * * *"

47 U. S. C. §153(b) defines "radio communication" as "The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *". The television and radio industries have construed this definition to include television as "one form of radio transmission". There can be no doubt of the correctness of this construction. See, for example, the testimony of Lodge, a Columbia Broadcasting System engineer. Section 3(d) states that "Transmission of energy by radio" or "radio transmission means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *" 47 U. S. C. §303(g) requires the Federal Communications Commission to study new uses for radio and both that body and its predecessor, the Federal Radio Commission, historically have exercised wide supervision over the development of television or "visual broadcasting" and have reported their work in this connection to Congress. The Communications Act of 1934 applies to every phase of television and it is clear that Congress intended the regulatory scheme set out by it therein to be exclusive of State action. See 47 U. S. C. §301, which recites the purpose of the act as, inter alia, the maintenance of "* * * the control of the United States over

all channels of interstate and foreign radio transmission * * *"

If there were any doubt respecting the intention of Congress in this respect, it would be set at rest by legislative history. Senate Report No. 781, discussing Senate Bill S. 3285, which later was enacted as the Federal Communications Act, stated, "The purpose of this bill is to create a communications commission with regulatory power over all forms of electrical communication. * * *" The language employed is so all inclusive as to leave no doubt but that it was the intention of Congress to occupy the television broadcasting field in its entirety. While section 410(a) provides for a measure of co-operation between the Federal commission and State regulatory bodies, it is clear that under the plan set out by that section the Federal commission remains the dominant regulatory force, members of the State regulatory bodies being engrafted, as it were, temporarily upon the Federal commission.

The Pennsylvania State Board of Censors contends in effect that the field of censorship was left open by the Federal Communications Act and therefore the State Board of Censors, as an exercise of State police power, may censor films used in television broadcasting. But, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 504, 582, the police power of a State consists of the exercise by a sovereign of the powers inherent in its "dominion" and the sovereignty of the Commonwealth of Pennsylvania cannot be exercised to censor motion picture films employed in television broadcasting because the broadcasting of films by television does not lie within the dominion of the Commonwealth. We cannot agree with the contention of the Board of Censors that censorship by the States is permitted under the act. While 47 U. S. C. §326, declares it to be a National policy that nothing in the act shall be understood to give the Federal commission "power of censorship" over

radio communications and that no regulation or condition shall be promulgated or fixed by the commission which shall interfere "with the right of free speech by means of radio communication", this does not mean that the State may exercise a censorship specifically denied to the Federal agency. Censorship may be defined as the forbidding of publication, i. e., prohibition of publication in advance of publication. The act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. Congress thus set up a species of "program control" far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case.

Five provisions of the Communications Act must be noted in this connection. 47 U. S. C. §308(b) provides for a careful check by the commission as to the character and responsibility of any person seeking to obtain a license to operate a broadcasting station. 47 U. S. C. §307(a) deals with applications for renewals of licenses. 47 U. S. C. §§309(b)(2) and 310(b) prohibit the assignment or transfer of a license without the written consent of the commission after it has secured full information respecting the responsibility of the assignee or transferee. 47 U. S. C. §303(m)(d), authorizes the commission to suspend the license of any operator upon proof that the licensee "* * * has transmitted * * * communications containing profane or obscene words, language or meaning * * *". Finally, section 326, now embodied in substance in 18 U. S. C. §1464, provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication.

It is clear from the foregoing that Congress was concerned with the contents of the programs of all broadcast-

ing stations, including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. Congress did not intend to control in advance the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether. Program control was entrusted to the Federal commission and it is an effective one. In National Broadcasting Co. v. United States, 319 U. S. 190, 215-216, the Supreme Court said, "The act itself establishes that the commission's powers are not limited to the engineering and technical aspects of regulation of radio communication * * * It puts upon the commission the burden of determining the composition of that traffic". The subject need not be labored further. We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States. Congress possessed the constitutional authority to effect this result: Hines v. Davidowitz, 312 U. S. 52, 74. It follows that the Commonwealth of Pennsylvania cannot censor the films used on the programs of plaintiffs' stations.

The judgment will be affirmed.

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